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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: HF Scientific, Inc.

File: B-245451

Date: January 2, 1992

Barbara H. Sneade for the protester.
John Martino, Panama Canal Commission, for the agency.
C. Douglas McArthur, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid proposing an "or equal system" under solicitation for brand name or equal product is nonresponsive where the descriptive literature submitted with the bid fails to establish that the product would meet all of the listed solicitation requirements.

DECISION

HF Scientific, Inc. protests the rejection of its bid submitted in response to invitation for bids (IFB) No. CSC-087464-NJ-29, issued by the Panama Canal Commission. The agency rejected the bid as nonresponsive.

We deny the protest.

On June 14, 1991, the agency issued the solicitation for a Hach Model 1720 C low range turbidimeter[1] or equal, for continuous turbidity measurement in accordance with listed specifications. These listed specifications required that the product have the capability of reading continuous turbidity measurements, a continuous water-flow design, a digital control unit encased in a rigid enclosure, with a recording output signal of 0-10, 100 millivolt (mV) and 4-20 milliamps (mA), and an internal bubble trap to eliminate false high turbidity readings due to condensation.

The solicitation provided that a bidder could offer a product other than the brand name product if it clearly identified such product and the government determined that the product offered fully met the listed salient

[1]Turbidimeters are instruments that measure the clarity of water.

characteristics. These listed features included the above specified output signal and internal bubble trap. The agency advised potential bidders that its determination would be based on information furnished by the bidders but that the purchasing activity would not be responsible for locating or securing any information not identified in the bid and reasonably available to the agency. The solicitation further clarified this requirement by advising that any bidder offering an "equal" product had to furnish all descriptive material necessary to determine the acceptability of the product offered.

The solicitation included the clause at Federal Acquisition Regulation (FAR) § 52.214-21, which states that descriptive literature is required to establish that an offered product meets solicitation specifications, and that the term pertains to significant elements such as (1) design; (2) materials; (3) components; (4) performance characteristics; and (5) methods of manufacture, assembly, construction or operation. The agency advised bidders that failure of the literature to show that the product offered conformed to the requirements of the solicitation would result in rejection of the bid.

The protester submitted the lowest of six bids received on July 29, 1991. On August 21, the agency advised the protester that it had rejected HF Scientific's bid as nonresponsive and made award to another bidder at a price of $55,825--$14,000 higher than the bid from the protester. This protest followed.

The agency found three areas in which the product that the protester offered differed from that specified. First, the agency found that descriptive literature submitted by the protester stated that the offered model showed a selectable voltage output of 10mV, 100mV, or 1.0V, rather than the 0-10 and 100mV specified. Second, the model offered a back pressure design, but no internal bubble trap as required by the specifications for elimination of false turbidity readings. Additionally, the protester's descriptive literature warned potential purchasers that the model was designed for a low humidity environment and recommended a dry gas purge of the sensing module to prevent problems from condensation in high humidity environments. The agency found that the product would be used in a high humidity climate and that this dry purge feature would require installation of additional equipment to provide for a dry gas purge and cost a significant amount of money.

To be responsive to a brand name or equal solicitation, bids offering an allegedly "equal" product must contain sufficient descriptive material to permit the contracting officer to assess whether the alternative possesses the salient

characteristics specified in the solicitation. Pitts Enters., Inc., B-232222, Oct. 12, 1988, 88-2 CPD ¶ 346. Where descriptive literature is required to establish conformance with the specifications, and bidders are so cautioned, the bid must be rejected as nonresponsive if the literature submitted fails to show clearly that the offered product conforms to the specifications. Allentown Caging Equip. Co., Inc., B-240494, Nov. 5, 1990, 90-2 CPD ¶ 365; AZTEK, Inc., B-229897, Mar. 25, 1988, 88-1 CPD ¶ 308.

The material submitted by HF Scientific with its bid did not clearly demonstrate that the product offered met the specified requirements. First, the material was unclear as to the voltage output. As the protester concedes in its submissions, its sales brochure furnished with its bid did not "correctly state the voltage output." It advises that the brochure contained a printing error, and states that its instruction manual, also included with the bid, contained the correct voltage output which met the solicitation requirements. Since the bid contained nothing to suggest which document might be in error, the agency could reasonably view the bid as not clearly establishing compliance with voltage output requirements. See AZTEK, Inc., B-229897, supra.

Second, the bubble trap was not a part of the protester's product. The purpose of the bubble trap and the back pressure system required by the specifications is to eliminate false readings caused by air bubbles escaping from the solution. The protester argues that its back pressure design is a "market standard" and just as effective as that specified; in this regard, the protester's descriptive literature states that false readings "can be prevented" by the back pressure system, but recommends increasing the size of the incoming line and reducing the flow rate to "help this condition." This language suggests that the "condition" resulting in false readings will remain, even if the back pressure system is fully operational. In any event, the protester has submitted nothing to clearly demonstrate the equality of this system with the bubble trap feature. The bidder's belief that its product is functionally equal to the name brand product is not enough; rather, the protester must affirmatively demonstrate that equivalency. Wayne Kerr Inc., B-217528, Apr. 18, 1985, 85-1 CPD ¶ 445. While the protester argues that the IFB's requirement for a bubble trap is merely an attempt to eliminate all potential products other than that specified, its arguments in this regard--essentially that the specifications are unduly restrictive of competition--are clearly untimely raised, since our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1991), require that such protests be filed prior to bid opening.

Third, the protester's instruction manual stated that "[t]he instrument should be located in a low humidity environment to prevent problems from condensation. If this is not possible, a dry gas purge of the Sensing Module is recommended." This gave rise to an agency concern that the product would not provide continuous water flow monitoring as required by the listed specifications in the high humidity environment in which the system is to operate the installation of additional equipment, including a purging system, at a significant additional expense. The protester basically asserts that, if care is exercised in using the system and the instruction manual is followed, no problem requiring purging would be encountered. However, given the manual operating instructions which effectively recommend purging in high humidity environments, we think the agency reasonably found that the descriptive literature did not clearly establish that the product would meet the continuous flow monitoring requirement. See JoaQuin Mfg. Corp., B-240777, Dec. 18, 1990, 90-2 CPD ¶ 498.

The protest is denied.

James F. Hinchman
for General Counsel